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No. 80-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LORAIN, A DIVISION OF KOEHRING COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CITATIONS

Cases: Page

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) 8, 9

Carbon Fuel Co. v. *Mine Workers*, 444 U.S. 212 (1979) 2, 3, 4, 8

Complete Auto Transit, Inc. v. *Reis*, 614 F.2d 1110 (6th Cir. 1980) 9

Eazor Express, Inc. v. *Teamsters*, 520 F.2d 951 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976) 3

Lakeshore Motor Freight v. *Local 800, Teamsters*, 483 F.Supp. 1150 (W.D. Pa. 1980) 3

Latas Libby's Inc. v. *Steelworkers*, 609 F.2d 25 (1st Cir. 1979) 7

Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344 (1921) 7

Pittsburgh Steel Co. v. *Steelworkers*, —— F.2d ——, 105 LRRM 2198 (3rd Cir. Aug. 6, 1980) .. 3

Sinclair Oil Corp. v. *Oil, Chemical & Atomic Workers*, 452 F.2d 49 (7th Cir. 1971) 9

Southern Coal Co. v. *UMWA*, 551 F.2d 695 (6th Cir. 1977) 3, 4

United States Steel Corp. v. *United Mine Workers*, 519 F.2d 1249 (5th Cir. 1975), *on rehearing*, 526 F.2d 377 (1976) 8

Statutes:

Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 ..... 8, 9

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Petitioner seems to raise three issues. As we show herein, two of these issues have already been settled by this Court, in a manner adverse to the claims of petitioner; the remaining issue was also rightly decided below and in any event involves nothing of general applicability, consisting merely of a claim that the court of appeals erred in construing the unique language of a particular collective-bargaining agreement and in applying that language to the specific facts of this case. Thus this case does not warrant review by this Court.

1. Petitioner contends that the collective-bargaining agreement between the Company and the Union [1] should be construed as providing that the Union will be answerable in damages for any failure to use its "best efforts" to terminate a work stoppage undertaken by employees without the Union's authorization. Pet. 10-14. The contract in question contains a "no-strike clause" which is unique in that it defines not only the actions which the Union is expected to undertake in connection with a work stoppage, but also the specific circumstances in which the Union may be held "liable for monetary damages" in connection with a stoppage.[2]

To the extent petitioner contends that the court of appeals erred in holding that the parties' unique no-strike clause did not contemplate damages in the circumstances of this case,[3] we show at pp. 4-7 *infra* that petitioner raises no general question of federal labor law, but solely a question as to whether the court of appeals properly construed the particular (and unique) language of the parties' contract, as applied to the specific facts of this case. However, petitioner also seems to suggest that notwithstanding the particular language of the no-strike clause, any union that enters an agreement to arbitrate grievances rather than to strike thereby incurs, by operation of the federal labor laws, liability in damages whenever the union does not use its "best efforts" to terminate a strike undertaken by its members without the union's authorization. Pet. 10-11. That suggestion is foreclosed by this Court's decision last Term in *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212 (1979).

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[1] For purposes of this opposition the term "Union" refers collectively to both respondents, the United Steelworkers of America, AFL-CIO-CLC, and its Local 8164.

[2] See pp. 4-5 *infra*.

[3] See Pet. 12-14.

In *Carbon Fuel*, the employer urged that an obligation on the part of a union "to use all reasonable means to prevent and end unauthorized strikes in violation of the collective-bargaining agreement . . . [should be] implied in law because the agreement contains an arbitration provision. . . ." *Id.* at 216. This Court "reject[ed] petitioner's suggestion that Congress' policy in favor of arbitration extends to imposing an obligation on [unions] which [have] agreed to arbitrate grievances, to use reasonable means to try to control [unauthorized strikes]." *Id.* at 218. In so holding, the Court expressly rejected the decision of the Third Circuit upon which petitioner relies, *Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). See *Carbon Fuel*, 444 U.S. at 212.[4] And the Court specifically approved the Sixth Circuit's refusal to follow *Eazor*. See 444 U.S. at 215-216, n. 4, citing *Southern Coal Co.* v. *UMWA*, 551 F.2d 695 (6th Cir. 1977). Thus, while petitioner points to this former conflict between the Third and Sixth Circuits and asks the Court to resolve it in favor of the Third Circuit, the fact is that the Court resolved the conflict last Term, in favor of the approach

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[4] In *Eazor*, as here, the no-strike clause was expressed in the contract, rather than implied as in *Carbon Fuel*. Both the Third Circuit and the author of the district court opinion in *Eazor* have recognized that the rationale of *Eazor* does not survive *Carbon Fuel*. See *Pittsburgh Steel Co.* v. *Steelworkers*, —— F.2d ——, 105 LRRM 2198, 2201-2203 (3d Cir. Aug. 6, 1980); *Lakeshore Motor Freight* v. *Local 800, Teamsters*, 483 F.Supp. 1150, 1152 (W.D. Pa. 1980) (Teitelbaum, J.). The analysis of *Carbon Fuel*, respecting the question whether a "best efforts" type duty should be implied in law, does not depend upon whether the no-strike clause is express or implied. This Court predicated its rejection of that duty on the recognition that "the legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency." 441 U.S., at 216 (footnote omitted).

articulated by the Sixth Circuit in *Southern Coal*, and followed in the instant case.

2. It is of course true that under *Carbon Fuel* a union may assume by contract the duty to use "best efforts" which this Court found not to be otherwise imposed by federal labor law. The contract here contains an explicit clause governing not only the Union's obligation with respect to work stoppages, but specifically the circumstances in which the Union may be held liable in damages for its conduct in connection with a stoppage. The court of appeals held that under the specific terms of this contract, the Union's conduct in this case did not fall within the category for which the parties agreed that damages may be recovered. Petitioner seeks to challenge that holding here. As we now show, that holding was correct; and since the court of appeals merely applied a particular private contract (and to our knowledge, a unique one) to a specific set of facts, review would not be warranted even if the court of appeals had erred.

The collective bargaining agreement between petitioner and the International Union contained the following provision:

> ARTICLE 2—STRIKES, LOCKOUTS, UNION ACTIVITY. There shall be no lockout by the Company, and the Union will not cause, sanction, or approve any employees represented by it to cause or participate in any strike, stoppage, slowdown or other interruption of work during the term of this Agreement, or any extension thereof mutually agreed to. On the contrary, the Union will actively discourage and endeavor to prevent or terminate any stoppage, slow-down, or other interruption of work, *and participation in such activities during this Agreement (or extension) shall result in discharge of all those employees responsible for such occurrences.* Any notice of discharge under this clause

> will be stated in writing to the employee(s) with copies to the Union and the President of the Local. All such notices mailed, will be sent by registered mail with a return receipt requested. *The Union shall not be liable for monetary damages for unauthorized strikes, work stoppage, etc. or other interruptions of work which are not authorized, supported, encouraged or ratified by it or its officers, or committeemen or duly authorized agents of the Union.* Any employee discharged or disciplined under this article shall have recourse to the grievance procedure, including arbitration. (App. 19, emphasis added).

As both the district court [5] and the court of appeals [6] recognized, this provision explicitly declares that the Union cannot be held liable for monetary damages in connection with a work stoppage unless the stoppage was "authorized, supported, encouraged or ratified by it or its officers, or committeemen or duly authorized agents of the Union." [7]

The district court found that the Union was not "in any way responsible for initiating the work stoppage"; rather, the stoppage was caused "by employees . . . acting upon their own initiative." App. A-26. The district court found that through the first three days of the five-day

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[5] App. A-27.

[6] App. A-5.

[7] Contrary to petitioner's assertion (see Pet. at 8, 13-14), the court of appeals did not refuse, because of the "prevailing Circuit philosophy," to give effect to the language in Article 2 of the agreement which states that the Union is to "actively discourage and endeavor to prevent or terminate" work stoppages. The court simply concluded, on the basis of unambiguous contract language, that breaches of that particular clause do not give rise to a claim for damages, because the contract expressly provides that "the Union shall not be liable for monetary damages" unless the union "authorized, supported, encouraged or ratified" a strike. App. A-5. See also the decision of the district court, App. A-27.

strike the Union did not "authorize, support, encourage or ratify" the strike in any way; to the contrary, the Union endeavored to end the strike. As the district court put it, during the first three days of the strike the Union made "reasonable endeavors . . . to effect a termination of the strike." *Ibid.* The court found that during this period, the Union officers on several occasions "sought to use their influence" first "to avoid the walkout" and then "to have the employees return to their jobs." App. A-20. When these efforts bore no fruit, the officers "sought to induce the other employees to return to their job by themselves returning to the plant." *Ibid.* Despite these and other efforts by the Union (App. A-20 - A-23), the employees refused to heed the Union's call to return to work.

The district court found that following these unsuccessful efforts to prevent and terminate the strike, the Union "abandoned all efforts to effect a return to work of the union members. . . ." App. A-27. The court "conclude[d] that the failure and refusal of the union agents to take any action after Sunday, July 18, in an effort to terminate the admittedly illegal work stoppage constituted a *ratification* of the strike from and after that date." *Ibid.* (emphasis added). (The strike ended two days later, when the Company filed a motion for a temporary restraining order which the Union did not resist. App. A-23.)

The court of appeals held that in the particular circumstances of this case, the district court had erred in concluding that the Union's failure—for the two day period between its last attempt to end the strike and the end of the strike—to repeat its unsuccessful efforts to end the strike constituted a "ratification" of the strike within the meaning of the parties' agreement. The court stated: "A finding that failure to act for two days under the circumstances which existed constituted ratification is

clearly erroneous." App. A-6. Petitioner asks this Court to grant certiorari to overturn the court of appeals' conclusion.

In the circumstances of this case, the court of appeals was correct in concluding that the Union's failure over a two day period to repeat its sincere but unsuccessful efforts to terminate the strike cannot be viewed as "ratification" of the strike [8] within the meaning of the particular contract here involved.[9] But in any event, the court's decision, being limited to the construction of the unique terms of a particular contract on a specific set of facts, does not warrant this Court's review.[10]

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[8] Cf. *Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 394 (1921).

[9] As discussed (see note 7, *supra*), while the contract states that the Union is to make certain efforts to "prevent or terminate" a work stoppage, the parties agreed that a breach of that obligation would not give rise to a claim for damages; rather, damages may be awarded only if the Union "authorized, supported, encouraged or ratified" the stoppage. By equating a cessation of the Union's efforts to terminate the work stoppage with a "ratification" of the stoppage, petitioner would simply write out of the contract the explicit limitation on damage liability to which the parties agreed.

[10] Petitioner contends that the First Circuit reached a different conclusion on "remarkably similar" facts in *Latas Libby's Inc.* v. *Steelworkers*, 609 F.2d 25 (1st Cir. 1979). The facts are not similar. The contract at issue in *Latas Libby's* stated that "no officer or representative of the Union or employee shall authorize, instigate, aid or condone" any work stoppage. *Id.* at 26. The court of appeals held the Union had "authorized" a strike, relying on testimony that an agent of the Union had advocated "that the men should go on strike immediately. . . ." *Id.* at 29. The court also held that the union had "condoned" the strike, because the dictionary meaning of "condone" is "[to] permit the continuance of." *Ibid.* In the instant case, by contrast, no union agent advised the employees to strike, and the contract does not provide that the Union is liable in damages if it should "condone" a strike; rather,

3. Petitioner's attempt to recover damages from individual officers and members of the Union is foreclosed by *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). *Atkinson* held that where an employer alleges that a union has violated a no-strike clause, the employer's cause of action under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, lies only against the union, even if the complaint alleges that individual officers and members acted as the Union's agents in breaching the contract. *Id.* at 246-249. That is to say, if "[p]roof of the allegations of [the employer's complaint] would inevitably prove a violation of the no-strike clause by the union itself," the complaint "fail[s] to state a claim for which relief can be granted [against officers or members]—whether the contract violation charged is that of the union or that of the union plus the union officers and agents." *Id.* at 247. Thus, *Atkinson* squarely holds that a § 301 suit against officers and members must be dismissed if the complaint alleges that the officers and members acted on behalf of the union in breaching a no-strike clause. The Court reserved the question whether a complaint "would state a proper § 301(a) claim if it charged unauthorized, individual action" (*id.* at 249, n. 7)—i.e., if the complaint alleged that the officers or members acted on their own, *ultra vires*, rather than as agents of the union.

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the Union can be liable in damages only if it "authorized, supported, encouraged or ratified" a strike.

Petitioner also suggests that the decision in this case on this question of interpretation of the no-strike clause somehow conflicts with that of the Fifth Circuit in *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1249 (5th Cir. 1975), *on rehearing*, 526 F.2d 377 (1976). This suggestion is inexplicable, for the contract in *United States Steel* did not contain a no-strike clause. See 519 F.2d at 1252. *United States Steel* dealt with the question, subsequently settled by *Carbon Fuel*, whether there is a "best efforts" duty created by the federal labor laws (see pp. 2-3, *supra*).

The complaint in this action did not allege "unauthorized, individual action." To the contrary, the complaint alleged *only* that the no-strike clause had been breached by "the Defendant Unions through its officers, agents and representatives." Complaint, para. VIII-XII.[11] The complaint is therefore indistinguishable from the complaint in *Atkinson*, and the district court was accordingly correct in granting the motion to dismiss as to the individual defendants.[12]

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[11] Joint Appendix in the Court of Appeals, pp. 4-5.

[12] Petitioner contends this case presents the issue which the Court reserved in *Atkinson*, because here the court of appeals ultimately held that the work stoppage was in fact not authorized by the Union. But in determining whether petitioner's complaint against the officers and members was properly dismissed, the question is what the complaint *alleged*—not what petitioner proved (or more accurately, failed to prove) at the trial respecting the Union's liability. *Atkinson* holds that a § 301 suit against officers or members must be dismissed unless the complaint alleges that the defendants were acting on an unauthorized basis. *Id.* at 249, n. 7. If, as is the case here, the complaint alleges that the officers and members were acting as agents of the Union, *Atkinson* holds that the complaint must be dismissed for failure to state a claim. Thus, the question reserved in *Atkinson* is not presented here.

Even if this case *did* present the issue reserved in *Atkinson*, review would not be warranted. The two courts of appeals which have addressed that issue have both reached the same answer—namely, that officers and members cannot be sued under § 301 even when unauthorized action is alleged. *Complete Auto Transit, Inc.* v. *Reis*, 614 F.2d 1110, 1114-1116 (6th Cir. 1980); *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers*, 452 F.2d 49 (7th Cir. 1971). Since the issue has reached the courts of appeals only twice in the 18 years since *Sinclair* (and has rarely reached the district courts, see Pet. at 15), and the circuits are in agreement on the point, review would not be warranted even if the issue proffered by petitioner were actually presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

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